MOHD KAMILZUHAIRI ABD AZIZ & ORS
v. PENDAKWA SYARIE SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM
SHAHNAZ SULAIMAN J
[JUDICIAL REVIEW NO: BA-25-36-06-2023]
5 FEBRUARY 2024

Abstract – *When a resolution of the issue at hand demands a thorough examination of Islamic law by competent jurists, the Syariah Court stands as the sole qualified forum for such deliberations. Civil High Courts lack the authority to intervene in matters exclusively under the jurisdiction of Syariah Courts. Consequently, charges such as being in contempt of a religious authority are not amenable to judicial review. Any interference by civil High Courts would be considered a violation of art. 121(1A) of the Federal Constitution*

ADMINISTRATIVE LAW: *Judicial review – Leave to commence – Application for – Seeking declaration asserting peaceful practice of Syiah faith and annulment of charges of acts in contempt of religious authority – Whether impugned charges amenable to judicial review by virtue of art. 121(1A) of Federal Constitution – Whether application filed out of time – Whether application non-justiciable – Failure to name relevant parties – Whether application frivolous and unsuitable*

CIVIL PROCEDURE: *Courts – Jurisdiction – Whether civil courts have jurisdiction in respect of matters within jurisdiction of Syariah Courts – Whether impugned charges of acts in contempt of religious authority fall within criminal jurisdiction of Syariah Court – Whether interference by civil courts a violation of art. 121(1A) of Federal Constitution*

On 17 October 2013, the Fatwa Sighah Berkaitan Ajaran Syiah di Negeri Selangor ('impugned fatwa') was gazetted to come into effect in the State of Selangor. The impugned fatwa was summarised in two parts (i) the understanding and teachings of the Syiah sect is contrary to and deviates from the real teachings of Islam according to the views of Ahli Sunnah Wal Jamaáh for reasons stated therein; and (ii) the Jawatankuasa Fatwa Negeri Selangor decided on what and how certain acts – all of which relate to the teachings, beliefs and/or understandings of the Syiah sect – by any Muslim, whether individually or in a group, are to be deemed as practising the teachings, beliefs and understandings which contravene the true teachings of Islam. Any Muslim who committed the matters mentioned in the second part of the impugned fatwa commits an offence and action can be taken under laws which are in force in the State of Selangor. The applicants averred that

they professed and practiced the teachings of the Syiah sect, one of the major sects in Islam, specifically, Syiah Ja'fariyah (one of the 12 denominations of Syiah sect). A major practice of the Syiah sect is to commemorate the martyrdom of Husayn Ali, known by the Syiahs as the day of Ashura ('commemoration'). On 6 September 2019, a group of individuals including the first applicant organised a closed event for the purpose of the commemoration ('event') which was also attended by the second and third applicants. The event was raided by the Jabatan Agama Islam Selangor ('JAIS') and the applicants together with 19 other attendees were detained and brought to the Pejabat Agama Islam Daerah Gombak for investigation and were later released. Subsequently, on 23 March 2023, the applicants were charged in the Selangor Syariah Subordinate Court for committing the following offences ('impugned charges') (i) in respect of the first applicant, the offence of attempting to act in contempt of a religious authority by defying the direction of the Mufti expressed in the impugned fatwa and thereby committing an offence under s. 52 of the Syariah Criminal Offences (Selangor) Enactment 1995 read with s. 12(c) of the Syariah Criminal Offences (Selangor) Enactment 1995; and (ii) in respect of the second and third applicants each, the offence of abetting the first applicant in attempting to act in contempt of a religious authority by defying the direction of the Mufti expressed in the impugned fatwa by participating together with the first applicant in the same event and thereby committing an offence under s. 49 of the Syariah Criminal Offences (Selangor) Enactment 1995. The applicants filed an application for leave to commence judicial review pursuant to O. 53 r. 3(1) of the Rules of Court 2012 ('ROC'), seeking the following reliefs, *inter alia*, (i) for a declaration asserting the peaceful practice of Syiah in any part of Malaysia; and (ii) the annulment of the charges against them. This application for leave was objected to by the Attorney General on these grounds (i) the application was filed out of time; (ii) the impugned charges were not amenable to judicial review by virtue of art. 121(1A) of the Federal Constitution ('FC'); (iii) justiciability of the impugned fatwa; and (iv) the applicants failed to name the relevant parties in the application.

Held (dismissing application):

(1) As apparent from the papers filed, the decision that was being challenged in this judicial review was the impugned charges against the applicants. It was a fact that the impugned fatwa was gazetted on 17 October 2013, but the grievance of the applicants was founded upon impugned charges which was preferred based on the impugned fatwa. The time frame for the filing of this application for judicial review commenced from the time the applicants were charged which was on 23 March 2023. It could not be that the applicants were required to challenge the impugned fatwa when there was no decision taken against them. (paras 27-29)

(2) The applicants were charged for the offence of violating the impugned fatwa. Jurisdiction is vested in the Selangor Syariah Subordinate Court to try these offences pursuant to s. 62(2)(a) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('2003 Enactment'). Consequently, the impugned charges were not amenable to judicial review pursuant to art. 121(1A) of the FC which dispossessed the civil courts of jurisdiction in matters falling within the exclusive jurisdiction of the Syariah Courts. The civil High Courts lacked the authority to intervene in matters exclusively under the jurisdiction of the Syariah Courts. The impugned charges currently under the Selangor Syariah Subordinate Court, fell within the exclusive criminal jurisdiction of the Syariah Court. Any interference by civil High Courts would be considered a violation of art. 121(1A) of the FC. The impugned charges were therefore not subject to judicial review, and the application for leave should be denied. This court is not being vested with any power to consider and quash the impugned charges. (paras 41-48)

(3) The impugned fatwa asserts that Syiah teachings significantly violate the authentic principles of Islam. It identified disapproved elements within Syiah teachings, considering some as inherent to its core, and declared Syiah teachings as deviant. Consequently, the impugned fatwa prohibits Muslims from practising Syiah teachings due to these perceived deviations from orthodox Islamic principles. The applicants were challenging the accuracy of the finding by the Jawatankuasa Fatwa Negeri Selangor and contested the substance of the impugned Fatwa. Hence, in order to answer whether the teachings of Syiah Ja'fariyah was in line with Islam, and thereafter decide whether the applicants were entitled to the reliefs sought, this court would have to consider delicate and complex issues of Islamic creed and faith, history, principles of comparative studies, interpretation of the Quran and prophetic narrations, and principles of practice, among others. This civil High Court was clearly not qualified nor equipped to deal with such issues. The resolution of the issue at hand demands a thorough examination of Islamic law by competent jurists and the Syariah Court stands as the sole qualified forum for such deliberations. The civil courts were not the forum to determine these matters and thus, this application was non-justiciable. (paras 52-56)

(4) Section 47 of the 2003 Enactment provides that the power to make fatwas was in the hands of the Jawatankuasa Fatwa. The applicants were seeking to challenge the impugned fatwa. The maker of the impugned Fatwa was the Jawatankuasa Fatwa. Whilst the applicants were seeking to challenge the impugned Fatwa, the party who made the impugned fatwa was not made a respondent in these proceedings. In order for the

applicants to challenge the impugned fatwa, the maker of the impugned fatwa namely the Jawatankuasa Fatwa ought to be made a respondent in this application seeking leave to commence judicial review proceedings. Failure of the applicants in so doing rendered this application liable to be dismissed. (paras 61-64)

(5) The impugned fatwa only applies to Muslims in the State of Selangor. The said prayer of freedom of practicing the Syiah sect in any part of Malaysia sought by the applicants had far-reaching effects and without naming the relevant parties and/or stakeholders, this application before this court was not a fit and proper case to be granted leave. There was evidently no merit in the applicant's case. Consequently, this leave application was deemed frivolous and unsuitable for judicial review. (paras 66 & 68)

Case(s) referred to:

Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors [2012] 7 CLJ 170 HC ***(refd)***

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor [2003] 4 CLJ 281 FC ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Kartini Farah Abdul Rahim & Anor v. Polis Diraja Malaysia & Ors [2023] CLJU 1913; [2023] 1 LNS 1913 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Mohd Habibullah Mahmood v. Faridah Dato Talib [2004] 1 CLJ ISL 91 SC ***(refd)***

Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301 FC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 FC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Imigresen Malaysia & Yang Lain [2020] 7 CLJ 621 CA ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss. 47, 48, 49(1), 62(2)(a)
Federal Constitution, arts. 11(1), 121, 121(1A), Schedule Ninth, item 1
Rules of Court 2012, O. 53 r. 3(1), (2), (6), (7)
Syariah Criminal Offences (Selangor) Enactment 1995, ss. 12(c), 49, 52

For the applicants - Eizlan Farhan Nakhrowi; M/s Cheang & Ariff
For the respondents - Ahmad Hanir Hambaly & Imtiyaz Wizni Aufa Othman; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Shahnaz Sulaiman J:

Introduction

[1] The applicants filed an application for leave to commence judicial review pursuant to O. 53 r. 3(1) of the Rules of Court 2012 ("ROC 2012") on 21 June 2023.

[2] The Honourable Attorney General objected to this application for leave.

[3] This court dismissed this application by the applicants for leave to commence judicial review proceedings. This is the grounds of this court in dismissing the applicants' application for leave to commence judicial review proceedings.

Reliefs Sought

[4] The applicants sought the following reliefs in encl. 1 (which was subsequently amended as per encl. 31) as reproduced below:

> (1) If necessary, an extension of time be granted to the applicants to file this application for judicial review and the application for leave to file this judicial review;
>
> (2) That the applicants be granted leave by this Honourable Court to apply for judicial review pursuant to O. 53 of the Rules of Court 2012 for the following relief:
>
> (A) A declaration that the religion of Islam of Syiah sect may be practiced in peace and harmony in any part of Malaysia;
>
> (B) A declaration that every person has the right to profess and practise the religion of Islam of Syiah sect pursuant to art. 11(1) of the Federal Constitution;
>
> (C) A declaration that sub-items i) to x) of item 2 of the Fatwa Sighah in relation to the Syiah's teaching in the State of Selangor ("Fatwa Sighah Berkaitan Ajaran Syiah Di Negeri Selangor') dated 7 October 2013 and published as Sel. P.U. 146 in the Government of Selangor Gazette dated 17 October 2013 is void;

(D) A writ of *certiorari* be issued against the first respondent and/or the second respondent for the following charges by the first respondent be removed to this Honorable Court and be quashed immediately:

(i) the charge against the first applicant read on 23 March 2023 in the Selangor Syariah Subordinate Court at Gombak Barat for committing on 6 September 2019 the offence of attempting to act in contempt religious authority by defying the direction of the mufti expressed in item 2(vi) of the Fatwa Sighah Berkaitan Ajaran Syiah Di Negeri Selangor and thereby committing an offence under section 52 of the Syariah Criminal Offences (Selangor) Enactment 1995 read with section 12(c) of the Syariah Criminal Offences (Selangor) Enactment 1995;

(ii) The charges against the second applicant and the third applicant each read on 23 March 2023 in the Selangor Syariah Subordinate Court at Gombak Barat each for committing on 6 September 2019 the offence of abetting the first applicant in attempting to act in contempt religious authority by defying the direction of the mufti expressed in item 2(vi) of the Fatwa Sighah Berkaitan Ajaran Syiah Di Negeri Selangor by participating together with the first applicant in the same event and thereby committing an offence under section 49 of the Syariah Criminal Offences (Selangor) Enactment 1995;

and/or any amended charges arising from the above charges.

(E) A writ prohibition be issued against the first respondent and/or second respondent prohibiting the first respondent and/or second respondent from commencing or continuing with any proceeding including preferring any charge in the Syariah Court based on the Fatwa Sighah Berkaitan Ajaran Syiah Di Negeri Selangor;

(F) Any other additional directions, orders or prerogative writs as a remedy to the applicants that the Honourable Court might hereafter finds fit and/or suitable to the circumstances of this case;

(G) The cost of this application; and

(H) Such further or other relief as this Honourable Court deems fit.

Factual Background

[5] The facts of this case are garnered from documents filed before this court.

[6] On 17 October 2013, the Fatwa Sighah Berkaitan Ajaran Syiah di Negeri Selangor (Sel. P.U.146.) ("the impugned fatwa") was gazetted to come into effect in the State of Selangor. The impugned fatwa could be summarised into two parts. The first part stated that the understanding and teachings of the Syiah sect is contrary to and deviates from the real teachings of Islam according to the views of Ahli Sunnah Wal Jama'ah for reasons stated therein.

[7] The second part of the impugned fatwa went on to state that the Jawatankuasa Fatwa Negeri Selangor decided on what and how certain acts – all of which relate to the teachings, beliefs, and/or understandings of the Syiah sect – by any Muslim, whether individually or in a group, are to be deemed as practicing the teachings, beliefs and understandings which contravene the true teachings of Islam. Any Muslim who committed the matters mentioned in the second part of the impugned fatwa commits an offence and action can be taken under laws which are in force in the State of Selangor.

[8] The applicants averred that they profess and practise the teachings of the Syiah sect, one of the major sects in Islam apart from Sunni or Ahlus Sunnah wal Jamaah. Specifically, the applicants state that they profess and practise Syiah Ja'fariyah (one of the 12 denominations of Syiah sect).

[9] A major practice of the Syiah sect is to commemorate the martyrdom of Husayn bin Ali, which occurred on the tenth day of the month of Muharram in 61 AH (year 680 CE), known by the Syiahs as the day of Ashura ("the commemoration"). As averred by the applicants, Husayn bin Ali is the grandson of Prophet Muhammad (Peace be upon Him, the last and final Prophet in Islam), and the commemoration took place annually for a span of the first ten nights every Muharram before the day of Ashura.

[10] On 6 September 2019, a group of individuals, including the first applicant, organised a closed event for the purpose of the commemoration ("the event") which took place at No 9C, Jalan SG 3/16, Taman Sri Gombak, 68100 Batu Caves, Selangor. This event was also attended by the second and third applicants.

[11] At or about 10pm on 6 September 2019, the event was raided by the Jabatan Agama Islam Selangor ("JAIS"), and the applicants together with 19 other attendees were detained and brought to the Pejabat Agama Islam Daerah Gombak for investigation. They were released on 7 September 2019.

[12] Subsequently, on 23 March 2023, the applicants were charged in the Selangor Syariah Subordinate Court at Gombak Barat for committing the following offences ("the impugned charges") on 6 September 2019:

(i) in respect of the first applicant, the offence of attempting to act in contempt of religious authority by defying the direction of the Mufti expressed in item 2(vi) of the impugned fatwa and thereby committing an offence under s. 52 of the Syariah Criminal Offences (Selangor) Enactment 1995 read with s. 12(c) of the Syariah Criminal Offences (Selangor) Enactment 1995; and

(ii) in respect of the second and third applicants each, the offence of abetting the first applicant in attempting to act in contempt of religious authority by defying the direction of the Mufti expressed in item 2(vi) of the

impugned fatwa by participating together with the first applicant in the same event and thereby committing an offence under s. 49 of the Syariah Criminal Offences (Selangor) Enactment 1995.

[13] This led to the filing of this present application by the applicants.

[14] Item 2(vi) of the impugned fatwa is reproduced as follows:

> "mana-mana orang Islam sama ada secara individu atau berkumpulan yang mengajar, **menganjur, mengadakan**, membantu menjayakan apa-apa perayaan, sambutan keraian atau majlis yang boleh dikaitkan dengan fahaman Syiah adalah disifatkan mengamalkan ajaran, pegangan dan fahaman yang bercanggah dengan ajaran Islam yang sebenar" (emphasis added in the charge sheets containing the impugned charges)
>
> (any person professing Islam who, whether individually or in a group, teach, **organise, hold**, assist to make happen any celebration, carnival, festival, or party which can be linked to the understandings of Syiah, is deemed to be practicing the teachings, beliefs and understandings which is contrary to the true teachings of Islam)
>
> (emphasis added)

The Law

[15] With regard to the law applicable for leave to commence judicial review, there are numerous authorities on this point. The Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 expounded the test for leave to commence judicial review as reproduced below:

> [12] ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though *ie*, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[16] The test laid down for leave to commence a judicial review in *WRP Asia Pacific Sdn Bhd* (*supra*) are as follows:

(i) whether the subject matter is amenable to judicial review; and if so,

(ii) from the materials available, whether the application is frivolous and if not thought as frivolous and if leave is granted, consider that the applicant has an arguable case which leans towards him obtaining the relief sought at the end of substantive hearing.

[17] The principles governing applications for leave to commence judicial review proceedings have also been set out in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 1 MLRH 507; [2006] 5 MLJ 60 at 943 (CLJ); 69 (MLJ) where Gopal Sri Ram JCA (as he then was) held:

> [10] .... the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous.. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable.

[18] Additionally, the Supreme Court in *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 stated the requirement for the application to challenge an Industrial Court award to show, *prima facie*, that it is not frivolous or vexatious and there is substance in the proposed challenge. The Supreme Court stated:

> At the outset of the hearing of the appeal before us, we indicated to the parties that we would hear submissions on the issue of leave only ... The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

[19] It is trite that the applicant will have to satisfy the tests propounded in the abovementioned cases in order to secure the leave to commence the judicial review proceedings. At this stage, the court need not go into the merits of the case, but only to see if the subject matter is amenable to judicial review or whether the application for leave is frivolous.

Objection By The Honourable Attorney General

[20] This application for leave was objected to by the Honourable Attorney General. The Honourable Attorney General submitted that the application for leave should be dismissed on the following grounds:

(i) the application is filed out of time;

(ii) the impugned charges are not amenable to judicial review by virtue of art. 121(1A) of the Federal Constitution;

(iii) justiciability of the impugned fatwa; and

(iv) the applicants failed to name relevant parties in the application.

Decision Of This Court

Application Is Filed Out Of Time

[21] Learned Senior Federal Counsel for the Honourable Attorney General submitted that O. 53 r. 3(6) of the ROC 2012 prescribes a specific time limitation for applications seeking leave for judicial review. For ease of reference, the provision is reproduced below:

A (6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[22] The Federal Court cases cited in support of this contention are *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] B 4 CLJ 193; [2013] 4 MLJ 161; *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54 and *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563.

[23] Learned Senior Federal Counsel took the position that an application C for judicial review to contest the impugned fatwa should have been submitted within three months from the date of its gazetting. The impugned fatwa was gazetted on 17 October 2013. It was submitted that the current application was lodged on 21 June 2023, and hence the application before this court is beyond the stipulated timeframe as it is filed, to lend the words of learned D Senior Federal Counsel, "almost exactly" ten years after the date of gazettement.

[24] It is observed that the applicants had in their application for leave to commence judicial review, sought an extension of time as follows:

E 1. Sekiranya perlu, satu perlanjutan masa diberikan kepada Pemohon-Pemohon untuk memfailkan permohonan semakan kehakiman ini dan permohonan kebenaran untuk memohon semakan kehakiman ini.

[25] Learned Senior Federal Counsel acknowledged that O. 53 r. 3(7) of the ROC 2012 allows the court to extend the time specified in r. 3(6) if the court F considers that there is a good reason for doing so. Nonetheless, according to the learned Senior Federal Counsel, no such reason is given by the applicants before this court and hence, this court ought to dismiss the application for an extension of time.

[26] The applicants, on the other hand, argued that the timeframe begins G when the applicants were charged in court on 23 March 2023. This application for leave to commence judicial review was filed on 21 June 2023. Hence, it was argued that this application was filed within time.

[27] As apparent from the papers filed, the decision that is being challenged in this judicial review is the impugned charges against the applicants. H Following from the decision to charge the applicants, this application for judicial review was filed.

[28] It is a fact that the impugned fatwa was gazetted on 17 October 2013, but the grievance of the applicants is founded upon impugned charges which is preferred based on the impugned fatwa.

I

[29] It is the considered view of this court that the timeframe for the filing of this application for judicial review commences from the time the applicants were charged which was on 23 March 2023. It cannot be that the applicants are required to challenge the impugned fatwa when there were no decision taken against them. This court therefore finds this objection to be without merit and the objection is hereby dismissed.

The Impugned Charges Are Not Amenable To Judicial Review By Virtue Of Article 121(1A) Of The Federal Constitution

[30] Learned Senior Federal Counsel, on behalf of the Honourable Attorney General, argued that the impugned charges are not amendable to judicial review. This is by virtue of the provision of art. 121(1A) of the Federal Constitution.

[31] In this regard, art. 121(1A) of the Federal Constitution reads:

> 121. (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[32] In relation to the applicability of art. 121(1A) of the Federal Constitution in this case and the approach this court should adopt, this court considered the case of *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289; [2003] 1 MLRA 283; [2003] 3 MLJ 705; [2003] 4 AMR 501 where the Federal Court held:

> [16] In *Abdul Shaik bin Md Ibrahim*, Abdul Hamid Mohamed J held that *the case is not removed from the jurisdiction of the Syariah Court merely because the plaintiffs have prayed for the remedy of declarations. His Lordship did not follow Isa Abdul Rahman but followed Soon Singh which adopted the 'subject matter' approach rather than the 'remedy prayed for' approach …*
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> ...
>
> [21] We respectfully agree with Abdul Hamid Mohamad J that *Isa Abdul Rahman cannot be supported*.
>
> ...
>
> [27] With respect, *the Court of Appeal, in our view, fell into the same error as the learned judge in taking 'the remedy prayed for' approach instead of the 'subject matter approach' …*
>
> (emphasis added)

[33] Further, in *Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor* [2003] 4 CLJ 281; [2004] 2 MLJ 529; [2003] 1 MLRA 570; [2002] 4 AMR 4437, the Federal Court held:

> [5] This appeal has again raised the question of jurisdiction of the Syariah Court and the High Court. *If the Syariah Court has jurisdiction over the matter, the High Court does not have jurisdiction over it – art 121(1A) of the Federal Constitution. That calls for the determination of the approach that the court should take in determining the jurisdiction of the Syariah Court*.

[6] This court has very recently decided on this point in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaikh Natar & Ors* [2003] 1 MLRA 283; [2003] 3 MLJ 705; [2003] 3 CLJ 289; [2003] 4 AMR 501. In that case, the subject matter was the adjudication and administration of the will of a deceased Muslim, even though the respondents (plaintiffs in the High Court) had prayed for remedies of a declaration that the land in question be surrendered to the estate of Shaik Eusoff bin Shaik Latiff, deceased, a declaration that the land in question be vested upon the respondents as executors of the deceased's estate and for an account and, in the alternative, the respondents prayed for damages and an injunction.

[7] Haidar CJ (Malaya) (delivering the judgment of the court) surveyed the earlier judgments of this court, the Supreme Court as well of the High Court and concluded: We respectfully agree with Abdul Hamid Mohamad J that *Isa Abdul Rahman* cannot be supported.

[8] It should be noted that '*Isa Abdul Rahman*' is the case of *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman Dan Satu Yang Lain* [1992] 1 MLRA 240; [1992] 2 MLJ 244; [1992] 1 CLJ (Rep) 2010. In that case, even though the land and mosque in issue were a 'wakaf am', the Supreme Court held that since the real order asked for by the respondents was a perpetual injunction to restrain the appellant or its agents from demolishing the said mosque and to restrain the appellant from taking any preliminary steps to demolish the mosque and erect a commercial building on the site and since the Syariah Courts did not have jurisdiction to issue an injunction, therefore the High Court had jurisdiction over the suit. This approach is what has become known as 'the remedy approach'. Secondly, the decision of Abdul Hamid Page 8 of 28 Mohamad J (as he then was) referred to in the judgment of Haidar CJ (Malaya) refers to the case of *Abdul Shaik bin Md Ibrahim & Anor v. Hussien bin Ibrahim & Ors* [1999] 5 MLJ 618 (HC) which adopted the 'subject matter' approach.

[9] Therefore, *this court has put to rest that the subject matter approach should be adopted*.

[10] In this case, *there is not doubt that the subject matter of the case is the custody of the child. That clearly falls within the jurisdiction of the Syariah Court*. Even learned counsel for the appellants did not dispute that. *His argument was that since the Syariah Court had no jurisdiction to issue the writ of habeas corpus, the civil court had the jurisdiction to issue the same in this case. The short answer to that argument is that habeas corpus is the remedy sought and not the subject matter of the case*.

[11] *Since the subject matter in question is the custody of the child and since that is clearly within the jurisdiction of the Syariah Court, by virtue of the provisions of art. 121(1A) of the Federal Constitution, the High Court has no jurisdiction over the matter*.

(emphasis added)

[34] Founded on the authorities cited, this court is of the considered view that the approach when deciding the applicability of art. 121(1A) of the Federal Constitution is the "subject matter" approach.

[35] In this case, the remedy that is being sought is a declaration and a *certiorari*. In support of this leave application, the applicants have cited art. 11(1) of the Federal Constitution pertaining to the freedom of religion.

[36] While the applicants have cited constitutionality issue as their grounds for this leave application to be granted, the approach to be taken as determined by superior courts cited is the subject matter approach. In this case, the subject matter that is being challenged is the impugned charges and consequently the impugned fatwa.

[37] Now, does the subject matter of this judicial review application fall within the ambit of the civil courts or the Syariah Courts?

[38] The Federal Constitution in item 1 of the Ninth Schedule provides:

> List II – State List 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, **creation and punishment of offences by persons professing the religion of Islam against precepts of that religion**, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; **the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law** and doctrine and Malay custom.
>
> (emphasis added)

[39] The State List manifestly confers power on the State Legislatures to create laws regarding the matters provided as reproduced above.

[40] Sections 52, 12(c), and 49 of the Syariah Criminal Offences (Selangor) Enactment 1995, which make up the basis of the charges against the applicants, are reproduced below:

52. Attempts

(1) Any person who attempts:

(a) to commit any offence punishable under this Enactment or under any other written law relating to Islamic Law; or

(b) to cause such an offence to be committed,

and in such attempt does any act towards the commission of such offence shall, where no express provision is made in this Enactment or such other written law, as the case may be, for the punishment of such attempt, be liable to be punished with such punishment as is provided for such offence.

(2) Any term of imprisonment imposed as a punishment under subsection (1) for an attempt to commit an offence or to cause an offence to be committed shall not exceed one half of the maximum term of imprisonment provided for the offence.

12. Contempt of religious authorities

Any person who acts in contempt of the lawful authority, or defies, disobeys or disputes the lawful orders or directions, of-

(a) His Royal Highness the Sultan in His capacity as the Head of the religion of Islam;

(b) the Majlis;

(c) the Mufti, expressed or given by way of a fatwa,

shall be guilty of an offence and shall on conviction be **liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both**.

49. Punishment for abetment

Any person who abets any offence shall, if the act abetted is committed in consequence of the abetment, notwithstanding that the person abetted does the act with a different intention or knowledge from that of the abettor, **be liable to the punishment provided for the offence**.

(emphasis added)

[41] The facts of this case are that, the Mufti had issued a fatwa banning the practice of Syiah teachings, specifically Fatwa Sighah Berkaitan Ajaran Syiah di Negeri Selangor (the impugned fatwa). The applicants were charged for the offence of violating the impugned fatwa. It would appear to this court that jurisdiction is vested in theSelangor Syariah Subordinate Court to try these offences. This is pursuant to s. 62(2)(a) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("2003 Enactment") which provides:

62. Jurisdiction of Syariah Subordinate Court

(2) The **Syariah Subordinate Court** shall:

(a) in its criminal jurisdiction, try any offence committed by a Muslim under the Syariah Criminal Offences Enactment (Selangor) 1995 or any other written law which prescribes offences against the precepts of the religion of Islam for which the punishment provided by such Enactment or other written law does not exceed three thousand ringgit, or imprisonment for a term of two years or both, and may impose any punishment provided for such offences; and

(emphasis added)

[42] Consequently, the impugned charges are not amenable to judicial review pursuant to art. 121(1A) of the Federal Constitution which dispossess the civil courts of jurisdiction in matters falling within the exclusive jurisdiction of the Syariah Courts. Article 121 and art. 121(1A) of the Federal Constitution reads as follows:

121. Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed)

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) **The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts**.

(emphasis added)

[43] There are numerous authorities to support this contention that the civil courts do not have jurisdiction in respect to matters within the jurisdiction of the Syariah Courts. The Federal Court in the case of *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 301; [2021] 2 MLJ 181 stated:

[103] All judicial power vests solely in the civil superior courts as per the basic structure of our FC ingrained in art 121. However, art 121(1A) dispossess the civil courts of jurisdiction *ratione materiae* once it is established that the subject-matter of the suit is one which falls within the jurisdiction of the Syariah Courts ...

A ...

[138] An important event took place in 1998. A new clause was added to the FC. The new cl (1A) of art 121 of the FC, with effect from 10 June 1988, provides that the civil courts shall have no jurisdiction with respect to matters within the jurisdiction of the Syariah Courts. The new clause
B has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. If a matter falls within the jurisdiction of the Syariah Court, the civil court has no jurisdiction over it (see *Majlis Agama Islam Pulau Pinang Iwn Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244; [1992] 3 CLJ 1675 ('*Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman*'), *Mohamed Habibullah bin Mahmood v. Faridah*
C *bte Dato Talib* [1992] 2 MLJ 793; [1993] 1 CLJ 264 ('*Mohamad Habibullah Mahmood*') and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; [1999] 1 AMR 1211).

[139] It is trite that only the FC is supreme; the Judiciary, the Executive and the Legislature are subject to the FC (see *Letitia Bosman v Public*
D *Prosecutor And Other Appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147). Pursuant to this important principle, the judicial power of the civil courts have been excluded by cl. (1A) of art. 121 of the FC resulting in the exclusion of jurisdiction of the civil courts over matters within the jurisdiction of the Syariah Courts. The amendment to the FC was made in order to avoid conflict between decisions of the Syariah Courts and the
E civil courts, to give the Syariah Courts exclusive jurisdiction over matters relating to Islamic law (see *Viran a/l Nagapan v. Deepa a/p Subramaniam And Other Appeals* [2016] 1 MLJ 585) ...

[44] In *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545, the Federal Court
F held:

[90] Thus based on the principles distilled from the above discussion, the effect of art. 121(1A) in the Malaysian context can be outlined as follows:

(a) the Federal Constitution is premised on certain underlying principles. In a *Westminster* model Constitution, these principles
G include the separation of powers, the rule of law, and the protection of minorities;

(b) these principles are part of the basic structure of the Constitution. Hence, they cannot be abrogated or removed;

(c) the role of the civil courts as established by virtue of art. 121 is
H fundamental to these principles. The judicial power of the civil courts is inherent in the basic structure of the Constitution;

(d) cl (1A) of art 121 of the Federal Constitution recognises the power of the Syariah Courts when it exercises its power within jurisdiction;
...

I

[45] See also *Mohd Habibullah Mahmood v. Faridah Dato Talib* [2004] 1 CLJ ISL 91; [1992] 2 MLJ 793; *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1; *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 CLJ 707; [1999] 2 MLJ 241; *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101.

[46] In summary, founded on the provision of art. 121(1A) of the Federal Constitution and the authorities cited, it is clear that the civil high courts lack the authority to intervene in matters exclusively under the jurisdiction of Syariah Courts. The impugned charges, currently under the Selangor Syariah Subordinate Court, fall within the exclusive criminal jurisdiction of the Syariah Court. Any interference by civil high courts would be considered a violation of art. 121(1A) of the Federal Constitution.

[47] As the position of art. 121(1A) of the Federal Constitution has been expounded by the authorities cited, this court is of the considered view that the impugned charges are not subject to judicial review, and therefore, the application for leave should be denied.

[48] As stated above, the impugned charges are within the exclusive jurisdiction of the exclusive criminal jurisdiction of the Syariah Court and therefore this court is not being vested with any power to consider and quash the impugned charges.

[49] However, if the court is to consider whether the impugned charges are lawful, it entails the challenge against the source of power of such impugned charges *ie*, the Administration of the Religion of Islam (State of Selangor) Enactment 2003 and the Syariah Criminal Offences (Selangor) Enactment 1995. This court has perused the statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012 filed together with this application (encl. 2 subsequently amended by encl. 32), and finds that the statement is devoid of any complaint by the applicants on such issue.

[50] In other words, the applicants are not challenging the validity of the sections to which the impugned charges was relied upon, but are challenging the validity of the impugned fatwa.

[51] Therefore, what is left before this court is the issue of the impugned charges which, as stated earlier, is not within the jurisdiction of the civil court.

Justiciability Of The Impugned Fatwa

[52] The impugned fatwa asserts that Syiah teachings significantly violate the authentic principles of Islam. It identifies disapproved elements within Syiah teachings, considering some as inherent to its core, and declares Syiah teachings as deviant. Consequently, the impugned fatwa prohibits Muslims from practising Syiah teachings due to these perceived deviations from orthodox Islamic principles.

[53] The applicants seek a declaration asserting the peaceful practice of Syiah in any part of Malaysia and the annulment of charges against them. This implies a challenge to the accuracy of the finding by the Jawatankuasa Fatwa Negeri Selangor. The applicants argue that the teachings of Syiah, specifically Syiah Ja'fariyah, align with true Islamic teachings, contesting the substance of the impugned fatwa.

[54] Hence, in order to answer whether the teachings of Syiah Ja'fariyah is in line with Islam, and thereafter decide whether the applicants are entitled to the reliefs sought, this court will have to consider delicate and complex issues of Islamic creed and faith, history, principles of comparative studies, interpretation of the Quran and prophetic narrations, and principles of practice, among others. This civil High Court is clearly not qualified nor equipped to deal with such issues. From this perspective, it is crucial to emphasise that the resolution of the issue at hand demands a thorough examination of Islamic law by competent jurists. The Syariah Court stands as the sole qualified forum for such deliberations.

[55] More importantly, it must be mentioned that this is the rationale for the introduction of art. 121(1A) of the Federal Constitution. The civil courts are not the forum to determine these matters.

[56] For this reason, this court agrees with the contention by learned Senior Federal Counsel that this application is non-justiciable.

The Applicants Failed To Name Relevant Parties In The Application

[57] The Honourable Attorney General's final grounds of objection are that the applicants have failed to name relevant parties as respondents in the present application.

[58] In *Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Imigresen Malaysia & Yang Lain* [2020] 7 CLJ 621; [2020] 5 MLJ 793, the court stated that it is a trite principle for any judicial review proceeding to determine whether the contested decision that the applicant seeks to overturn is explicitly identified in the application for permission. If the application is directed against an incorrect decision or against the authority that made the contested decision incorrectly, it would render the application for permission incompetent.

[59] In *Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 7 CLJ 170; [2012] 1 MLJ 92 (Rohana Yusuf J) held:

> [10] ... In a judicial review proceeding, the court undertakes the review of the decision by a decision maker, and not by any other person. Since the Chief Minister is not in any way involved in the impugned decision, he cannot be a party to the application.
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> ...

> [12] Thus, since the first respondent and the third respondent are not the decision makers of the impugned decision, judicial review cannot lie against them. To put it differently, there is no decision by the first and second respondents that is before this court to review. On this ground alone, this application ought to be struck out.

[60] Ahmad Kamal Md Shahid J in his recent judgement for *Kartini Farah Abdul Rahim & Anor v. Polis Diraja Malaysia & Ors* [2023] CLJU 1913; [2023] 1 LNS 1913; [2023] MLJU 2114 stated:

> [37] The AGC submitted that since this application is to challenge the decision made by the deputy public prosecutor, there is no purpose in naming the Respondents as parties. The AGC further submitted that the Applicant must correctly identify the party responsible for the decision in the exercise of the public duty or function that he challenged.
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> ...
>
> [48] Hence, this Court is of the view that the failure of the Applicants in citing the correct party who had made the said decision in which the Applicants wish to challenge, renders this application irregular.

[61] In the present application, the applicants seek to challenge the impugned fatwa. Section 47 of the 2003 Enactment provides that the power to make fatwas is in the hands of the Jawatankuasa Fatwa, on the direction of His Royal Highness the Sultan, and subsequently His Royal Highness' assent. The provision is reproduced below:

> 47. Power of the Fatwa Committee to prepare a fatwa Subject to section 51, the Fatwa Committee shall, on the direction of His Royal Highness the Sultan, and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare fatwa on any unsettled or controversial question of or relating to Hukum Syarak.

[62] Section 48 of the 2003 Enactment, on the procedure in the making of a fatwa, illustrates the role of the Jawatankuasa Fatwa plays in making fatwas.

[63] In this application, the applicants have not named the Jawatankuasa Fatwa as a respondent. The applicants are seeking to challenge the impugned fatwa. The maker of the impugned fatwa is the Jawatankuasa Fatwa Negeri Selangor, which had not been named as a respondent.

[64] Whilst the applicants are seeking to challenge the impugned fatwa, the party who made the impugned fatwa is not made a respondent in these proceedings. In the view of this court founded on the authorities cited above, in order for the applicants to challenge the impugned fatwa, the maker of the impugned fatwa, namely the Jawatankuasa Fatwa Negeri Selangor ought to be made a respondent in this application seeking leave to commence judicial review proceedings. Failure of the applicants in so doing renders this application liable to be dismissed.

[65] It is observed that one of the prayers sought by the applicants, namely a declaration that the religion of Islam of Syiah sect may be practised in any part of Malaysia, cannot be overlooked in light of the impugned charges and subsequently, the impugned fatwa, which is the subject matter for this application. In this respect, reference is made to sub-s. 49(1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 which reads:

> 49. A fatwa published in the *Gazette* is binding
>
> (1) Upon its publication in the *Gazette*, a fatwa shall be binding on every Muslim in the State of Selangor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Hukum Syarak to depart from the fatwa in matters of personal observance

[66] It can be gleaned from the above subsection that the impugned fatwa only applies to Muslims in the State of Selangor. The said prayer of freedom of practicing the Syiah sect in Malaysia sought by the applicants has a far-reaching effect and without naming the relevant parties and/or stakeholders, this application before this court is not a fit and proper case to be granted leave.

Conclusion

[67] Considering that this is a request for leave to initiate judicial review proceedings under O. 53 of the ROC 2012, it is well-established that the criteria for obtaining leave to proceed with judicial review must be met. After reviewing the application, this court is satisfied that the subject matter of this application is not suitable for judicial review.

[68] Upon careful consideration, this court finds that the applicants have not successfully met the requirements of the judicial review test. As previously discussed, the subject matter in this case has been established by law. There is evidently no merit in the applicants' case. Consequently, this leave application is deemed frivolous and unsuitable for judicial review.

[69] Therefore, the application for permission to commence judicial review proceedings (encl. 1 amended by encl. 31) is hereby dismissed with no order as to costs.